

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 12, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1195-CR

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT IV

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STATE OF WISCONSIN,

**PLAINTIFF-RESPONDENT,**

v.

COLIN C. MORSE,

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

DYKMAN, P.J. Colin Morse appeals from a judgment convicting him of first-degree recklessly endangering safety while possessing a dangerous weapon, possession of a short-barreled shotgun, burglary, battery, and criminal damage to property. He also appeals from an order denying his motion for postconviction relief. Morse argues that: (1) the trial court erred in refusing to

sever the charges; (2) the trial court erred in refusing to allow him to testify as to events underlying some of the allegations, but remain silent as to the other allegations; and (3) the trial court erroneously exercised its discretion in sentencing him to a total of twenty-one years and nine months in prison. We reject his arguments and affirm.

## **BACKGROUND**

On January 5, 1996, Morse was charged with several offenses stemming from events occurring at the cabin of Dr. Richard Hilsabeck and at the home of Donald and Ruth Biggar. Morse, a juvenile when the alleged offenses were committed, was waived into adult court.

According to the criminal complaint, on November 23, 1995, Dr. Hilsabeck contacted police to report that someone had entered his cabin in the Town of Weyauwega without his permission and stolen a shotgun and several boxes of ammunition. Also taken from Hilsabeck's cabin were two pairs of gloves and a liter of Southern Comfort liquor. The intruder discharged a shotgun once while inside the cabin, shooting through the wall.

On November 27, 1995, Ruth Biggar contacted the police to report that her husband, Donald, had been involved in a confrontation and struggle with an Asian male who was armed with a shotgun. The Biggars had let their three dogs outside at their residence in the Town of Weyauwega at approximately 6:00 p.m. that night. The dogs began to bark. Donald went outside and walked to the northwest corner of his premises, where he observed a shotgun barrel coming around the corner of the garage. Donald grabbed the barrel, but slipped on the ice as he was trying to pull the gun out of the hands of the person holding it. The male subject then discharged the shotgun at Donald, but missed. Donald grabbed

the subject's legs, and the assailant fell and dropped the gun. The assailant repeatedly punched Donald in the face, and Ruth came out of the house and grabbed the gun. Donald pushed free from the assailant, took the gun from Ruth and pointed it at the assailant until the police arrived. The shotgun used by the assailant was the same shotgun that was reported stolen from the Hilsabeck cabin.

After obtaining Donald's account of what had occurred, the officers followed tracks in the freshly-fallen snow and determined that the assailant had approached the Biggars' garage from railroad tracks located to the north of their property. Near a sidewalk to the north of the garage, officers found a Southern Comfort bottle.

While at Riverside Medical Center, the assailant identified himself as Colin Morse from the Rawhide Boys Ranch. Rawhide Boys Ranch had previously reported to authorities that Morse ran away from that facility on November 14, 1995.

With regard to events occurring at the Hilsabeck cabin, Morse was charged with burglary while arming himself within the burglarized enclosure and criminal damage to property while armed. With regard to the incident at the Biggar residence, Morse was charged with attempted first-degree intentional homicide while using a dangerous weapon, possession of a short-barreled shotgun, and battery.<sup>1</sup>

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<sup>1</sup> Morse was also charged with possession of a firearm by a delinquent, contrary to § 941.29, STATS., and possession of a dangerous weapon by a child, contrary to § 948.60(2), STATS. These charges were dismissed before trial.

Prior to trial, Morse moved to sever the charges stemming from the Hilsabeck cabin incident from the charges stemming from the incident occurring at the Biggar residence. He also moved the trial court to allow him to testify only as to the events at the Biggar residence, but remain silent as to the other allegations. The trial court denied both motions.

At trial, Morse testified on his own behalf. The jury found him not guilty of attempted homicide while using a dangerous weapon, but guilty of the lesser offense of first-degree recklessly endangering safety while using a dangerous weapon. Morse was also found guilty of possession of a short-barreled shotgun, burglary while arming himself within the burglarized enclosure, battery, and criminal damage to property. The court sentenced him to nine years in prison on the first-degree recklessly endangering safety conviction, two years on the possession of a short-barreled shotgun conviction, ten years on the burglary conviction, and nine months on the battery conviction. These sentences were to be served consecutively, totaling twenty-one years and nine months. He was also sentenced to a concurrent nine-month sentence on the criminal damage to property conviction.

Morse filed a motion for postconviction relief, raising the same arguments that he raises here. The trial court denied the motion, and Morse appeals.

## **JOINDER**

Morse argues that the trial court erred in refusing to sever the charges stemming from the Hilsabeck cabin incident from the charges stemming from the incident at the Biggar residence. Our review involves a two-part process. First, we must determine whether the initial joinder was proper. *State v. Locke*,

177 Wis.2d 590, 596, 502 N.W.2d 891, 894 (Ct. App. 1993). This is a question of law that we review *de novo*. *Id.* Second, if the initial joinder was proper, we review whether the trial court should have severed the joined offenses to avoid prejudice to the defendant. *Id.* at 597, 502 N.W.2d at 894. This decision is left to the trial court's discretion. *Id.*

Under § 971.12(1), STATS., joinder is proper when two or more crimes “are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.” Crimes are considered the same or similar in character if they are the same type of offense that occurred over a relatively short period of time and the evidence as to each overlaps. *Locke*, 177 Wis.2d at 596, 502 N.W.2d at 894. Crimes are considered to be connected or to constitute parts of a common scheme or plan when “the crimes charged have a common factor or factors of substantial factual importance, *e.g.*, time, place or *modus operandi*, so that the evidence of each crime is relevant to establish a common scheme or plan that tends to establish the identity of the perpetrator.” *Francis v. State*, 86 Wis.2d 554, 560, 273 N.W.2d 310, 313 (1979). Section 971.12(1) is to be broadly construed in favor of joinder. *State v. Hoffman*, 106 Wis.2d 185, 208, 316 N.W.2d 143, 156 (Ct. App. 1982).

Here, the State appears to concede that the charged offenses were not of the same type or based on the same act or transaction. However, the State argues that joinder was permissible because the offenses are based on two or more acts connected together or constituting parts of a common scheme or plan. The State contends that the charges reflect a similar *modus operandi*, were close in time and geography, and reflected a common plan.

We agree. The incidents at the Hilsabeck cabin and the Biggar residence occurred shortly after one another and in the same town. In addition, Morse's actions at the Hilsabeck cabin and Biggar residence reflect a similar modus operandi and common plan. In both incidents, Morse entered upon the land or dwelling of another in an apparent attempt to obtain supplies and shelter after he ran away from the boys facility where he resided. Finally, the facts from the incident at the Biggar residence are relevant to establishing whether Morse was the perpetrator of the crimes committed at the Hilsabeck cabin. The shotgun found on Morse at the Biggar residence was the same shotgun that was reported missing from the Hilsabeck cabin, and a bottle of Southern Comfort was found near the Biggar residence and had been reported missing from the Hilsabeck cabin. Because the charged offenses were based on two or more acts connected together or constituting parts of a common scheme or plan, the trial court properly joined the offenses.

Morse also argues that his defense is prejudiced by the joinder of the offenses, and therefore even if the initial joinder was appropriate, the trial court erroneously exercised its discretion in denying his motion to sever the offenses. If it appears that the defendant is prejudiced by joinder of the offenses, the trial court may order separate trials of the offenses. Section 971.12(3), STATS. We will not conclude that the trial court erroneously exercised its discretion unless Morse can show that the failure to sever the counts caused him "substantial prejudice." *See Locke*, 177 Wis.2d at 597, 502 N.W.2d at 894.

In his motion for severance, Morse stated that he was prejudiced by the joinder of the offenses because he may testify as to the charges stemming from the incident at the Biggar residence, but wished to invoke his right to remain silent regarding the cabin incident. At the motion hearing, Morse's counsel argued:

Given the nature of that case, I don't believe the defendant would be testifying at a trial with regard to [the charges arising from the cabin incident]. I believe the defense would probably be that the state just didn't have enough evidence to prove beyond a reasonable doubt that those allegations in fact occurred. However, given the allegations contained in [the charges arising from the incident at the Biggar residence], I do believe the defendant may testify as to those counts, and it would be impossible for the defendant to take the stand and testify freely as to the ... four counts [arising from the incident at the Biggar residence] and then invoke his right to remain silent on the ... two counts [arising from the cabin incident]. That would highly prejudice the defendant....

The trial court denied Morse's motion, stating:

I understand the concern that [Morse] may wish to testify on some counts and not on others, but the defendant is required to make a convincing showing that he has important testimony to offer regarding one count and a strong need to refrain from testifying at another, and he must present enough information to show a claim of prejudice that is genuine and to enable the court to weigh the economy and expedition of judicial administration against his interests in having a free choice to testify, and I'm not convinced there is sufficient information presented to this court at this time that this court believes that it's appropriate to sever these counts in regard to his wish to testify on certain counts and not on others. I simply don't think there is sufficient information presented to this court that would justify this court in ordering severance, so I will be denying at this time the motion for severance.

In *State v. Nelson*, 146 Wis.2d 442, 458, 432 N.W.2d 115, 122 (Ct. App. 1988), we set forth the test for determining whether to grant severance in cases where the defendant intends to testify as to some events but not as to others:

[N]o need for a severance exists until the defendant makes a convincing showing that he [or she] has both important testimony to give concerning one count and strong need to refrain from testifying on the other. In making such a showing, it is essential that the defendant present enough information ... to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the considerations of "economy and expedition in judicial

administration” against the defendant’s interest in having a free choice with respect to testifying.

(Citation omitted; alterations in original.)

During his motion to the trial court, Morse did not make any showing, much less a convincing showing, that he had important testimony to give concerning the incidents at the Biggar residence. Morse’s trial counsel simply stated that “the defendant may testify as to those counts.” This is not enough information for the trial court to determine whether Morse’s claim of prejudice outweighs the considerations of judicial economy and expediency. Therefore, we conclude that the trial court properly exercised its discretion in denying Morse’s motion for severance.

On appeal, Morse argues that he had a compelling need to give testimony regarding the incident at the Biggar residence because he needed to testify that he did not intend to kill Donald Biggar. But Morse did not make this argument during his motion for severance. Our task is to evaluate the trial court’s exercise of discretion, not to independently evaluate each new argument for severance that Morse presents on appeal. In making a discretionary determination, the trial court must rely on “the facts appearing in the record.” *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). The trial court here did so, and therefore its exercise of discretion is sustained.

### **LIMITATION ON CROSS-EXAMINATION**

Morse argues that the trial court erred in denying his motion to limit the State’s cross-examination of him, if he elected to testify, to only those matters reasonably related to the subject matter of his direct examination. In his motion, Morse stated that he may elect to testify as to the events occurring at the Biggar

residence, but elect to remain silent as to the allegations stemming from the cabin incident. In support of his argument, Morse cites *Neely v. State*, 97 Wis.2d 38, 45, 292 N.W.2d 859, 864 (1980), which states: “It is well established that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination.”

We reject Morse’s argument. Because the existence of Morse’s privilege to refuse to answer questions on cross-examination depends on the relevance of the questions to Morse’s direct testimony, “the issue of privilege and its possible waiver cannot be determined with any certainty until cross-examination begins.” *Haskins v. State*, 97 Wis.2d 408, 416, 294 N.W.2d 25, 32 (1980). “Until the subject matter of the defendant’s testimony and the actual questions are known, disputes as to whether the defendant has waived his privilege against self-incrimination as to those questions are not factually presented.” *Id.*

At the time of the motion hearing, the trial court had not heard Morse’s direct testimony or the State’s questioning on cross-examination. Therefore, the trial court would not have been able to determine the extent to which Morse had waived his privilege against self-incrimination at that time.

Morse could have limited his direct testimony to events occurring at the Biggar residence and then moved the trial court to limit the State’s cross-examination or objected to the State’s questions regarding the cabin incident. He did not do so. Instead, on direct examination, Morse admitted entering the Hilsabeck cabin. He admitted that he picked up a shotgun from under a bed and

squeezed the trigger, shooting into the bedroom wall.<sup>2</sup> He testified that he found another shotgun laying against the wall, sawed off the barrel to that gun and took it with him to the Biggar residence. Because Morse specifically testified as to the events occurring at the Hilsabeck cabin on direct examination, he opened the door for the State's cross-examination of him regarding the cabin incident.

### SENTENCING

Morse argues that his sentences were unduly harsh, based upon improper considerations, and not reasonably related to the offenses for which he was convicted. Sentencing is left to the trial court's discretion, and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Harris*, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). There is a strong public policy against interference with the sentencing discretion of the trial court. *Id.* We presume that the trial court acted properly, and the defendant has the burden to "show some unreasonable or unjustified basis in the record for the sentence complained of." *Id.* at 622-23, 350 N.W.2d at 638-39.

In sentencing, the trial court should consider three primary factors: the gravity of the offense, the character of the defendant, and the need to protect the public. *Id.* at 623, 350 N.W.2d at 639. The court did so in this case.

The court considered the gravity of the offenses. The court considered the offenses together as part of a continuing pattern of conduct. The court considered the substantial impact that Morse's conduct had on Donald Biggar, whose head was next to the shotgun when Morse discharged it. Morse

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<sup>2</sup> Morse testified that he did not know that the gun was loaded and that he did not intend to discharge the gun.

also assaulted Biggar, behavior which the trial court found to be intolerable. The court found that probation would unduly depreciate the seriousness of the offenses.

The court considered the character of the defendant. The court noted that Morse had been involved with the juvenile justice system. The court was troubled by the fact that when Morse was previously stopped for operating a motor vehicle without the owner's consent, he was armed with a knife and a container of tear gas. Morse was also carrying a hunting knife during an event for which he was adjudicated delinquent for burglary. The court was concerned over Morse's need to carry weapons, as he did in this case. The court also noted that Morse was apparently highly intelligent and should understand that he cannot possess a short-barreled shotgun.

Finally, the trial court considered the need to protect the public. The court believed that incarceration was necessary to protect the public from further criminal activity on the part of Morse. Because the court's sentence was based on the proper factors, we conclude that it properly exercised its sentencing discretion.

Morse sets forth several factors which he believes show that the court's sentence was unduly harsh. He notes that he has no prior adult criminal convictions, was never placed under state supervision or in a secure correctional facility as a juvenile, and was abandoned by his parents in his native Korea before he was adopted and brought to America. But we have no reason to believe that the court did not consider mitigating factors during sentencing. The trial court noted that Morse was facing a total of fifty-two years and six months in prison for his convictions, yet sentenced him to a prison term that totaled less than one-half of the aggregate maximum.

Morse also argues that the trial court sentenced him as if he was found guilty of attempted first-degree intentional homicide, when in fact he was found not guilty of that charge. But the trial court specifically stated: “This court can understand the finding of the jury in regard to first-degree recklessly endangering safety, and it has to be understood that it’s on that charge that this defendant is being sentenced, and he’s not being sentenced on a charge of attempted first-degree homicide ....” Because the trial court specifically stated that it was not sentencing Morse on the charge of attempted first-degree homicide, we reject Morse’s argument.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.

